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Mediated postnuptial agreements and ancillary matters: Surindar Singh s/o Jaswant Singh v Sita Jaswant Kaur [2014] SGCA 37

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When the parties in a divorce have, with the benefit of legal counsel, gone through mediation and negotiated an agreement to settle the ancillary issues of maintenance and the division of matrimonial assets, is there any reason for the court to exercise its statutorily conferred discretion to ignore such an agreement or should it seek to uphold it despite objections from one of the parties? Whereas the High Court in this case declined to follow all of the terms in the agreement on the ground that some of them were not just and equitable, the Court of Appeal held that given the context in which the agreement was made, the agreement should not only be given significant weight but conclusive weight and full effect. The reasoning and implications of the Court of Appeal's decision will be considered in greater detail here.

The parties had been married for 35 years before obtaining an interim judgment of divorce in 2007. They attempted to settle ancillary matters thereafter and a day-long mediation took place in 2011, with experienced legal counsel present for both parties. An agreement to settle all disputes (of which the parties had opportunities to make amendments to) was reached, and though both parties signed the document, the wife later changed her mind and said she did not wish to be bound by the agreement. As regards matrimonial assets (with a total value of approximately 14 million SGD), the agreement had stipulated that the husband would receive 68% of the assets, while the wife would receive the remaining 32%. The High Court, while noting that the terms of the agreement were certain and the parties were *ad idem* when it was made, held that the division should instead be equal as this would be more just and equitable in the circumstances of the case. Specifically, it was reasoned that: (a) this was a long marriage; (b) the wife made significant financial contributions to the most valuable assets to be divided; and (c) the involvement of both parties was not restricted to either the financial or domestic spheres.

Why then did the Court of Appeal disagree? Under s 112 of the Women's Charter (Cap 353, 2009 Rev Ed), the court, while having the power to order the division of matrimonial assets in such proportions as it thinks just and equitable, has a duty to have regard to any agreement by the parties made "in contemplation of

divorce". The Court of Appeal (at [41]–[43]) first made the preliminary observation that, contrary to the husband's argument, agreements reached after divorce proceedings have commenced will still be caught by s 112; the court's discretion is not fettered just by virtue of the timing of the agreement. The court further clarified (at [44]) that because of the overriding discretion given to the courts by s 112, mediated agreements made in the context of divorce proceedings are distinct from general mediated agreements. It also suggested (at [50]–[52]) that generally, postnuptial agreements should be given more weight than prenuptial agreements, especially if the postnuptial agreement is in the form of a separation agreement.

Turning then to the High Court's judgment, the Court of Appeal held that while settlement agreements form only one of the factors for the court to consider under s 112 when dividing matrimonial assets, these agreements can in certain situations be the weightiest factor. It said (at [54]):

> Indeed, where parties have properly and fairly come to a formal separation agreement with the benefit of legal advice, the court will generally attach significant weight to that agreement unless there are good and substantial grounds for concluding that to do so would effect injustice. This approach is sensible because the parties to a marriage are in the best position to determine what is a just and equitable division of the matrimonial assets based on their own assessment of each party's direct and indirect contributions to the marriage and their knowledge of the extent and value of the assets. Due to the inherent limitations of fact-finding in the litigation process, the court should not lightly depart from such a separation agreement.

It also emphasised (at [60]):

> Whilst the end of a marriage may be legally brought about by the issue of an interim judgment, the marriage will not end in truth until all outstanding matters are settled and the parties are free to walk away and rebuild their lives. This cannot happen as long as they are disputing the division of the assets and having to rebut each other's cases in relation to the same. That process often breeds contention and bitterness. Thus, it would be in both parties' interests if they could come to a negotiated solution without resorting to determination by the courts which would resuscitate old complaints and acrimonious feelings. The process also takes time and can be costly. Such solutions can be facilitated by mediation.

Given the now-common use of prenuptial and postnuptial agreements by couples to regulate post-divorce contingencies, the Court of Appeal has provided cogent guidance as to how the courts would likely treat such agreements, especially postnuptial separation agreements that have benefitted from legal advice. This decision appears to be the clearest yet on the important distinctions between prenuptial and postnuptial agreements, and also sends the signal that mediation is a tool that parties in divorce proceedings can and

should use to their advantage, for a variety of reasons. As the Senior Minister of State for Law noted recently (Indranee Rajah SC, "Transforming the Family Justice System: Recommendations of the Committee for Family Justice" (2014)):

> [F]amily cases are far less about legal issues than they are about emotional ones. Clients who are otherwise rational and logical can, in family disputes, take intransigent positions on matters which, viewed objectively, should never be brought to court but end up being litigated anyway due to the inability to separate the legal issues from the emotional ones. More often than not, this plays out in the form of protracted, acrimonious proceedings … a fusillade of unnecessary applications and cross-applications, vituperative allegations and counter allegations and a heavy undertow of angst which affects everyone, lawyers included. This has knock-on undesirable effects in terms of parties' inability to move on … as well as incurring unnecessary time and costs …

The Minister further explained (Indranee Rajah SC, "Transforming the Family Justice System: Recommendations of the Committee for Family Justice" (2014)) that under the revamped family justice landscape that will soon materialise, stakeholders must understand the importance of reducing the "acrimony and emotional trauma and focus on conflict resolution." In practical terms, family lawyers who undergo specialist training in negotiation, counselling, mediation, and emotional conflict resolution skills will receive Family Law Practitioner accreditation, while if cases make it to court judges "will be empowered to take a much more proactive role in court proceedings" to make matters less adversarial in nature. If litigants are not represented by legal counsel, a Court Friend may be appointed to give practical support. All in all, the shift of family law disputes from the courtroom to alternative, less adversarial channels is now more palpable than ever. The court's upholding, as opposed to intervention, of the mediated settlement agreement in this case and its general endorsement of avoiding litigation in such disputes further confirm this.

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